

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

PHILLIP MARK BAILEY #1619414 §

VS § CIVIL ACTION NO. 6:11CV680

DIRECTOR, TDCJ-CID §

ORDER ADOPTING REPORT AND RECOMMENDATION

The above-entitled and numbered petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 was heretofore referred to United States Magistrate Judge Judith K. Guthrie. The Report of the Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. Petitioner has filed objections.

Having made a *de novo* review of the objections raised by Petitioner to the Report, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and Petitioner's objections are without merit. Specifically, Petitioner contends that he has given a "fair opportunity to the state of Texas, via the trial courts handling of his state habeas corpus [case]" and that he is dissatisfied with how the 114th Judicial District Court of Smith County, Texas, has handled it. *See Objections at 2-3.* Petitioner misapprehends the problem with his federal petition. As the Report states, his state application has not yet been reviewed or ruled upon by the highest state court of Texas, the Court of Criminal Appeals, and therefore, his state habeas claims have not been exhausted. Therefore, his objections are without merit and his federal petition must be dismissed. Dismissal without prejudice is appropriate where there are unexhausted grounds. *See Rose v. Lundy*, 455 U.S. 509, 510, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). It is therefore

ORDERED that the Petitioner's petition for habeas corpus pursuant to 28 U.S.C. § 2254 is **DENIED** and the case is **DISMISSED** without prejudice. A certificate of appealability is **DENIED**. All motions by either party not previously ruled on, including specifically Petitioner's motion to appoint counsel and for an evidentiary hearing (docket entry #8), are hereby **DENIED**.

So ORDERED and SIGNED this 18th day of January, 2012.

A handwritten signature in black ink, appearing to read "LEONARD DAVIS". The signature is fluid and cursive, with a large loop at the top and a horizontal line at the bottom.

**LEONARD DAVIS
UNITED STATES DISTRICT JUDGE**